

THE *AVENENCIA*. PEACEFUL CONFLICT RESOLUTION IN SPANISH
CHRISTIANS AND MUSLIMS' LAW (10th-16th centuries)¹

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SHORT CURRICULUM VITAE

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ABSTRACT

¹ This paper has been carried out within the framework of the R&D Project DER2009-09193/JUR of the Spanish Science and Innovation Ministry.

Spanish Law sources have long and uninterruptedly covered the arbitration institution in the context of justice administration. ‘Arbitration,’ ‘consent settlement’ or ‘conciliation’ are terms with peculiar meanings within the legal systems that have shaped the History of Law. Andalusí Law dealt with the arbitration institution for two main reasons. The first reason had to do with its importance as a fast and effective means to resolve differences or conflicts between parties. The second reason referred to the particularities presented by this resolution modality with respect to Maliki orthodoxy. This paper seeks to analyse the elements and characteristics of arbitration and consent settlement with the aim of drawing a more exhaustive picture of this institution which was a usual way to resolve conflicts between Christians and Muslims since the Middle Age.

KEY WORDS. Arbitration, Consent settlement, Conciliation, Consent settlement judges, Arbitrating judges

TABLE OF CONTENTS: I. Conciliation and settlement consent in the Law of Andalusí communities and that of Castilian kingdoms. II. The intervention of arbitrators and consent settlement seekers at conflict resolution in Andalusí Law and in historical Law. III. Requirements, qualities and powers that could be demanded from arbitrators and consent settlement judges. IV. Powers of arbitrators and setters of broken agreements. V. The exercise of arbitration seeking to reach consent settlement.

I. Conciliation and consent settlement in the Law of Andalusí communities and that of Castilian kingdoms.

Arbitration is one of the institutions of which we have practically no regulatory traces in the legislation that Castilian kings gave to the Indies². This has been

² Although the *Fuero Juzgo* [Legal code of 1241 which was basically a translation of the *Liber Iudiciorum* drawn up by the Visigoths in 654] and the *Fuero Real* [Royal Charter] deal with this institution and regulate the intervention of arbitrators in the resolution of certain interpersonal conflicts, it is the text of the *Partidas* [Statutory Code compiled by Alfonso X the Wise] that Indiano legislation refers back to. All this regulation justifies the role played by the institution during the Middle and Modern Ages both in the Peninsula territory and in the Indies, and so it is going to be proved throughout this study. The following laws can be taken as a referential axis for Castilian legislation in these matters: *Partidas*, III, 2, laws 18, 19, 20, 24, 35, 36, 37; tit. 3, law 7; tit. 4, laws 4, 6, 23, 25, 25, 26, 27, 28, 29, 30, 31, 32, 34 and 35; tit. 5,

highlighted by professors Díaz Couselo and Dougnac Rodríguez in recent studies about the historical background of this institution in Argentina and Chile, respectively³. There are equally few documented cases for the time being where *consent settlement* or *arbitration* were options used by wise men who committed themselves to achieve fair, equitable solutions in out-of-court contexts. However, arbitration was the means to solve the problems which arose as a result of the territorial licences granted to Columbus and the issue of borders⁴; relevant matters for delegates whose discussion objects were Public Law matters already at that time. Nevertheless, historiography has taken an interest in other cases where arbitration impacted on individuals' private sphere. Among them stand out the cases studied by Loghman Villena⁵ and Gil⁶; commercial practices and mercantile law in general are matters where the defence of privative rights corresponding to the individuals concerned is often subjected to voluntary jurisdiction. *Arbitral* decisions between Spanish merchants are quite frequent in this field regarding aspects linked to trade with the Indies or disputes about gear in navigation matters.

Professors Díaz Couselo & Dougnac refer to arbitration cases during the indiano period and highlight the singularity of these cases as opposed to the relevance acquired by arbitration in national law. These authors insist on the enormous possibilities that the

10; tit. 10, 8; tit. 16, 33 and 38; tit. 18, 27 and 106; tit. 22, laws 1, 5, 7, 17 and 24; t. 23, 13, 17. *Partida* V, tit. 14, 49; *Partida* VII, tit. 7, 8. And also in *Recopilación de las leyes de Castilla*, Book II, t. 4; t. 5, 6, 13 and 17, and t. II, 2; Book III, t. 9, 3, 7 and 8; Book IV, t. 21, 4, t. 25, 13; Book V, t. 16, 1 and 2. They all suffered modifications and amendments in later legislation, as we are going to show. An exhaustive treatment of this institution can be found in MERCHÁN, A., *El arbitraje. Estudio histórico jurídico*, Sevilla, 1981.

³ DÍAZ COUSELO, J. M^a, "La jurisdicción arbitral indiana. Su continuidad en Buenos Aires después de la Revolución (1810-1880)" in *Revista de Historia del Derecho*, 35 (2007), pp. 173-193 and DOUGNAC RODRÍGUEZ, A., "Antecedentes históricos sobre la regulación del Arbitraje en Chile" in *Estudios de arbitraje. Libro homenaje al Profesor Patricio Aylwin Azocar*, Editorial jurídica de Chile, 2007, pp. 55-74.

⁴ In this respect, see the works published on arbitration procedures on an international scale during the 16th century; RUMEU DE ARMAS, A., "Colón en Barcelona. Las bulas de Alejandro VI, y los problemas de la llamada exclusión aragonesa", *Anuario de Estudios Americanos*, Sevilla, I (1944), pp. 433-524. JOS, E., "Investigaciones sobre la vida y obras iniciales de don Hernando Colon", in *Anuario de Estudios Americanos*, Sevilla, I(1944), pp. 527-698 and GUTIÉRREZ DE ARCE, M., "La colonización danesa en las islas vírgenes. Estudio histórico-jurídico" in *Anuario de Estudios Americanos*, Sevilla, II (1945), pp. 363-513.

⁵ LOHMAN VILLENA, G., "Los corsos: una hornada monopolista en el Perú en el siglo XV" in *Anuario de Estudios Americanos*, Sevilla, 51-1(1994), pp. 15-45.

⁶ GIL, J., "Marinos y mercaderes en Indias (1499-1504)" in *Anuario de Estudios Americanos*, 42(1985), pp. 247-449.

funds and archives of American institutions offer to researchers, mentioning the *Archivo de Escribanos*, *Capitanía General* and *Real Audiencia*, amongst others. This implies the possibility to develop a research line on the importance of *arbitral trials* as a usual conflict resolution modality in modern times⁷. Although there are hardly any references in the regulations of the time, those references started to be more common from the 19th century onwards; in this case, the institution plays an essential role as an instrument at the service of the State and even has its own legislation.

The reader interested in this way to solve conflicts will find it interesting to know the impact, the importance and the origins of the arbitral institution in the territorial context shared by the communities belonging to different religious denominations within the Iberian Peninsula. Peninsular law is obviously the main referent about this institution, but we should not forget either that the Iberian Peninsula became a cultural mosaic since the 8th century, a mosaic where the Law in the Muslim, Jewish and Christian communities was applied by virtue of belonging to one religious denomination or another, although mixed solutions were exceptionally imposed. Exceptionality gave way to habituality as a result of coexistence and intercultural relationships.

Seeking to understand the arbitral institution's scope, the present paper has as its aim to focus on the legal system of Islamic communities, a legislation which, despite keeping its particular nature on certain occasions, and precisely due to this characteristic, concurred on common points when the dispute referred to the interests of individuals with different religious denominations. Arbitration is an institution in Andalusí Maliki law which was frequently applied during the period comprised between Muslims' settlement in the territory of the Iberian Peninsula and the 16th century.

This legal system coincided in time with the transmission of Castilian Law to the Indies in the second half of the 15th century, during the 16th century and until the final expulsion of Muslims from the Peninsula. The purpose of this study is therefore to analyse the elements and requirements which legitimised the use of arbitration not only

⁷DÍAZ COUSELO, "La jurisdicción arbitral", op. cit., page. 174. DOUGNAC, "Antecedentes históricos", op. cit., page 63; note the reference to the study by Palacio Gómez dedicated to the first arbitral trials (op. cit. Cfr. note 60).

within the Islamic community but also in those territories where Castilian law was applied.⁸

II. . The intervention of arbitrators and consent settlement seekers at conflict resolution in Andalusí Law and in historical Law

Exactly as it happened in Castilian law, Andalusí Law generally drew a distinction between voluntary jurisdiction (*qāḍā al juṣūs*) and ordinary jurisdiction (*qāḍā al ‘umūm*), or litigious jurisdiction. Whereas ordinary jurisdiction was the one which developed in different procedural stages, voluntary jurisdiction consisted in the resolution of conflicts outside the procedural regime which, consequently, did not entail litigation⁹.

In the context of Islamic Law, this conflict resolution modality was reinforced by Koranic precepts, thanks to which it took root and was thoroughly accepted. The *consent settlement* had a significant spiritual component, was advisable and praiseworthy in the eyes of God because it permitted to stress the fraternal bond which linked the community members and, consequently, the willingness to keep those bonds beyond any discrepancy or confrontation. Consent settlement, *ṣulḥ*, resulted from a disagreement and from the parties' relinquishment of their right to file a claim before the court, favouring instead a consensus or concord between those involved. Al-Qayrawānī states that this way to solve conflicts was licit for every issue as long as it was not subject to legal prohibition (*harām*), even by means of testimony or denial of

⁸ In accordance with a point of view that was supported by the majority, governance rules or laws in the Islamic world came to be considered a religious duty by virtue of personal acceptance for this sort of regulations; similarly, arbitration was during a large part of Islam's history the way in which Muslims settled the controversies which arose between them. Arbitration, exactly the same as governance, represents a contractual form which interferes with the evolution of their lives. The legitimacy of arbitration and sentences is unquestionable, even though the power owned by States grew. On the other hand, arbitration is considered a democratic interaction modality which contributes to the development of the legitimacy principle and other action forms. MOUSSALLI, A. S., "Islamic democracy and Human Rights" in *Oriente Moderno*, 2 (2007), pp. 437-455.

⁹ CALERO SECALL, M^a I., «Justicia, cadíes y otros magistrados » in El reino nazarí de Granada, (1232-1492), Política, instituciones, Espacio y economía, in *Historia de España de Menéndez Pidal*, t. VIII-III, Madrid, 2000, pp. 367-427.

the facts.¹⁰ One of the most usual practices among Andalusí people was the widowed wife's relinquishment of her right to receive the dowry remainder (*kālī*) in favour of the right corresponding to the husband's heirs, in return for an economic compensation that could satisfy her; and this was one of the cases where the arbitrator's intervention was advisable.¹¹

The close link between the spiritual benefit brought by these interventions and the effectiveness of the compromise that might be reached –above all in the context of contractual relationships– justifies why the Andalusí Maliki doctrine determined that consent settlement could only be applied on things which could be alienated or transferred, that is, things for which trade was licit.¹²

The *ḥākim*¹³ of Pre-Islamic times had to accommodate to the provisions contained in the jurisdictional system with the advent of Islām; in fact, the arbitral institution continued to exert its functions although complementarily to the intervention by the *qāḍī*. This phase of adaptation from the old institution to the new jurisdictional model is not covered in the study of the Andalusí period for obvious reasons. Indeed, the person entrusted with justice administration among the members of this community was the *qāḍī al-muslimīn* from the early moments of Muslim settlement in the Peninsula. The territorial expansion of *Islām* and the signature of peace treaties ('*ahd*') with people belonging to other religious denominations made it advisable to appoint officials with specific objective powers: the *ḥākim-dimmī*, an arbitrator who dealt with issues arising between Muslims and *The Book People* in Muslim territory, an institution

¹⁰ FAGNAN, E., *Risala ou traité abrégé du Droit malikite et moral musulmane*, Paris, 1904, chap. XXXVIII, pp. 266-267 (hereinafter *Al-QAYRAWĀNĪ, Risala*).

¹¹ IBN AL-'AṬṬĀR, *Formulario notarial*, op.cit., pp. 653-660. Both this type of debts and those incurred with anybody else, which are not due or can be changed by other payable ones and with characteristics below the one firstly incurred can be subject to an agreement, for the same amounts in accordance with the mutual or change rules in Islamic Law and seeking to avoid speculation and unfair enrichment (*ribā'*). See op. cit., mod. No. 176, 177, 178, 179 and 180; and about the inheritance of goods delivered by means of a loan contract *salam*, mod. No. 182, pp. 686-687.

¹² *Al-QAYRAWĀNĪ, Risala*, op. cit., chap. XXXVIII, pp. 266-267.

¹³ By derivation, this term gives rise to another which denotes an arbitral procedure within the Islamic framework: the *taḥkīm*. This term refers to arbitration as a usual practice in pre-Islamic Arabia before the absence of a public power that represented justice administration. It is a private kind of justice. The survival of this modality after the advent of Islām is due to the fact that Mohammed acted as an arbitrator between his contemporaries. In this respect, see TYAN, E., voz "*ḥākim*" en *Enciclopedia of Islam*, (hereinafter *EF*), vol. III, Leiden-London, 1986, page 72.

on which information is given by Ḥalīl Ibn Ishāq¹⁴. The arbitrator for issues with the *ḍimmīs* shared the space at the court house with the *qāḍī al- ḡamā'a*. It is worth highlighting that the same name was given to consent settlement seekers in Pre-Islamic times and to those who assumed this role between Christians and Muslims. Similarly, the *ḥākim* kept his status as a person able to solve litigious matters between these individuals peacefully. An attempt was thus made to avoid the development of a process with regulations, characteristics and phases which were sometimes unknown to the local judges.¹⁵

One of the controversial issues was the number of individuals who intervened in this sort of conflicts, especially within the framework of Andalusī Maliki Law. It can clearly be seen that ever since the early times of Islām the preference was for the involvement of only one person in the peaceful resolution of conflicts. This practice was rejected by law experts from the East and the Maghreb. Abū Bakr b- al-‘Arabī, regarded as one of the reformers of Malikism in al-Andalus, expressed his discrepancy about the supposed inconvenience of sending two arbitrators for the reconciliation of spouses, a practice identified and used in these lands from the times of Yaḥyā b. Yaḥyā. Nevertheless, the most consolidated practice among Andalusī people was the intervention of a single arbitrator or *ḥakam*, in accordance with the proposal made during the early times of Islām¹⁶. In spite of that, Abū Bakr b- al-‘Arabī kept his proposal for a double intervention in his condition as *qāḍī* of Seville during the Almoravid period.

The *Mi'yār* of al-Wanṣarīsī¹⁷, a work written in the 16th century, describes in terms of innovations that Andalusī Alfakis had abandoned the Koranic prescription (*farīḍa*) about the intervention of two arbitrators and its preference for sending an

¹⁴ LEVI-PROVENÇAL, E., "La organización judicial", op. cit., page 122 and TYAN, *Histoire de l'Organisation*, op. cit., page 91; similarly ḤALĪL IBN ISHĀQ, *Muḥtaṣar*, op. cit., page 218 Arabic version and GUIDI-SANTILLANA, op. cit., t. II, page 595.

¹⁵ MAÍLLO SALGADO, F., *Diccionario de Derecho islámico*, Gijón, 2005, page 112.

¹⁶ Ibidem, pages 79 and 82 respectively. The discrepancy expressed by Andalusī jurists in relation to the school founder's doctrine is dealt with in the book by AL-NUBĀHĪ AL-MĀLAQĪ, *al-Marqaba al-'ulyā*, op. cit., page 51.

¹⁷ AL-WANṢARĪSĪ, *al-Mi'yār al mu'rib wa l-yāmi al mugrib 'an fatawī ahl Ifrīqiya wa al-Andalus wa l.-Maghrb*, 13 vols., Rabat, 1401-1981; vol. 2, pp. 443-444.

*amīn*¹⁸, a Koranic practice which was taken up again by Ibn al-Arabī during the time in which he exerted the role of *qāḍī*¹⁹. On the other hand, a reference is made to the prophetic tradition (*sunna*) which foresaw the admission of evidence from a single witness confirmed by the oath of the person concerned²⁰. In any case, the Andalusī Ulemas clarified the possibility to send the aforementioned *amīn*, instead of designating the two arbitrators, as long as the former fulfilled the requirements of honourableness and religiousness that could be demanded for his intervention.

The controversy regarding the number of arbitrators or setters of broken agreements is not exclusive to Andalusī law. Quite the opposite, Castilian law –more precisely in the *Leyes de Estilo* [*Style Laws*]– already covered this issue when it highlighted that ordinary jurisdiction corresponds to a single person, whereas in towns that same jurisdiction was shared between two individuals and, what is more, it was specified that there should be one person for each one of the two parties involved in the conflict. These judges came to be known as *delegate judges* and were put on a level with arbitrators; although it might seem that these two positions were the same, that is not the case, as the former acted by court order and following an explicit delegation of the maximum legal authority, while the latter did so by virtue of *compromise*²¹. The demand for two good men, able to *battle with* controversial situations will be thoroughly regulated in the *Partidas* law code; following that text, the arbitrators were competent to intervene in specific and exceptional issues related to civil or criminal affairs²². By virtue of the delegated power granted to them they could be seen as ordinary judges in certain cases. Their decisions or *sentences* (*rulings*) were fully valid, even if they had been adopted by one of them in the absence of the other, exactly as if they had resulted from mutual consent²³. Nevertheless, in the context of towns, these ‘judges’ could neither *battle with* nor *judge* jointly or univocally, which was justified by

¹⁸ FIERRO, M^a I. "Los mālikīes de al-Andalus y los dos árbitros (al-ḥakamān)" in *Al-Qanṭara*, 6 (1985), pp. 79-102.

¹⁹ *Ibid*, p. 96.

²⁰ Al-WANŠARĪSĪ, *al-Mi'yār*, op. cit., vol. 2, pp. 444-445.

²¹ *Leyes de Estilo*, 218. And it is thus definitively instituted in the law of the *Partidas* IV, 4.19

²² Crimes which entailed the application of corporal punishment and banishment, those related to servitude and freedom cases and “conflicts or lawsuits about marriage” were outside the powers of these arbitrators. But they could actually deal with cases derived from betrothal or future promise; the lawsuits associated with communal goods and some issues related to tutelage and curatorship. *Partidas* III, 4.24.

²³ *Partidas*, III, 4.32.

the fact that each one of them acted on behalf of one of the sides or parties and was appointed by it²⁴.

A different task corresponded to the special judges empowered to deal with issues of little quantitative value which did not exceed the amount of two-hundred and twenty *dirhams* in the context of Andalusí communities. Whereas they were often known as *justices of the peace*²⁵ in Christian territories, they came to be known as *ḥākim* in Al-Andalus. The action carried out can be frequently verified in the territory of the Peninsula until the 15th century according to the *Leyes de Moros* [*Moorish Laws*].²⁶

In the context of Christian communities, and especially those ruled by the *Fuero Real* [Royal Charter], the intervention of these arbitrators as *friendly setters of broken agreements* was meticulously regulated, a circumstance which justifies why that intervention had a procedural character in the opinion of some authors²⁷.

The study of the Indiano context reveals some coincidences with what has already been explained, especially concerning the demand for the intervention of two arbitrators, trust, and the power recognised and assigned by mandate. An example for this action modality was the arbitration exerted by the prior of Seville, Francisco de Jaén, who acted on behalf of Diego de Lepe, head captain of the ship *Castilla -by virtue of the commission granted by the latter in accordance with a legally valid document-* and Luís Rodríguez de la Mezquita, who acted on behalf of the merchant Diego de la Mezquita, his son. The problem referred to the supervision of goods which travelled to the Indies, and the resolution was given in a document dated on January 10th 1502, according to the accreditation carried out before two scriveners, Gonzalo de Salinas and Diego de Medina, in Seville.²⁸

The intervention of an arbitrator or friendly setter of broken agreements on behalf of each party was questioned in the conflict which arose between *pizarristas* [supporters of Hernando and Gonzalo Pizarro] and *almagristas* [supporters of Diego de

²⁴ *Leyes de Estilo*, 218

²⁵ This figure has its origin in the East and seems to have been extrapolated to the Andalusí context. TYAN, *Histoire de l'Organisation*, op. cit., page 104.

²⁶ *Leyes de moros del siglo XIV*, ed. Gayangos, P., in *Memorial Histórico Español*, Madrid, 1853, pp. 11-246; op. cit., tit. CCII, page 158.

²⁷ DÍAZ COUSELO, J., "La jurisdicción arbitral indiana" op. cit. pp. 173-193.

²⁸ GIL, J., "Marinos y mercaderes en Indias (1499-1504)" in *Anuario de Estudios Americanos*, 42(1985), pp. 286 and ff.

Almagro] in the 15th century, and more precisely in 1534. Although Boadilla was appointed by the former and the friar Francisco de Husando by the latter at that moment, the sources refer to the intervention of an arbitrator as a single judge, who was López de Gomara in this case²⁹.

The possibility to appoint a third person continued to be used over time; thus, for example, the option to appoint a third person with a facultative character and before a case of doubt was contemplated in the *frame conflict* with Vicente Yañez Pinçon³⁰. We find an analogous action, at least regarding the business object, in the one analysed by Lohman Villena and corresponding to the controversy which arose between Gaspar de Solís and Juan de Frías, a situation which was resolved through arbitration under the same conditions³¹. In all these cases, the controversy which triggered the intervention of *arbitrators* finished with a *convention* between the parties.³²

The cases mentioned here –studied within the framework of *Indiano* Law by Professor Díaz Couselo– clearly refer to *arbitral jurisdiction*, subjected to legal coverage in the *Partidas*. The intervention of arbitrators or ‘consent settlement seekers’ selected and appointed by the parties to fight the battle they waged with one another actually acquired legal force by virtue of this regulatory reference³³. However, the name ‘*consent settlement seekers*’ was reserved for those who exerted voluntary jurisdiction outside the public administration, acting as *friendly setters of broken agreements*. Esteves Saguí adds a new term to the concept of voluntary jurisdiction: ‘compulsory arbitration,’ to which the *committers* –those who assume a commitment and the addressees of a *compromise* or *arbitral decision*– subject themselves. The actions to be carried out will

²⁹DE ARMAS MEDINA, F., “El clero en las guerras civiles del Perú” in *Anuario de Estudios Americanos*, 7 (1950), pp. 1-46.

³⁰GIL, J., “La cuentas de Cristóbal Colón”, in *Anuario de Estudios Americanos*, 41 (1984), pp. 425-511.

³¹LOHMAN VILLENA, G., “Los corsos: una hornada monopolista en el Perú en el siglo XV” op. cit. pp. 17 and ff.

³²HEVIA Y BOLAÑOS, J. de, *Curia Philipica*, Madrid, 1767, ed. facs. Lib. 2, chap. 14, No. 1, page 432.

³³ The works of Castro & Esteves Saguí deal with this procedural matter in an uneven proportion following the Castilian law, which was analysed by the aforementioned author; see Díaz Couselo, J.M., “La jurisdicción arbitral indiana”, op. cit., page 177. About the action and powers of consent settlement seeking judges in Castilian law see *Partidas*, III,4. 26.

require the fulfilment of some requirements such as the succession of moments which develop over time, which is qualified as a ‘procedure.’³⁴

I. The arbitral institution in the nomenclature of Peninsular Law sources and its repercussion

One of the most controversial aspects in this field is the one related to the concepts often used to designate the voluntary intervention of individuals who were alien to the business in which the parties had come to be involved or, otherwise, to controversy for various reasons –related to trade, marriage or crime. The variety of concepts used to refer to the same institution generates certain difficulties when the time comes to specify the scope of powers and roles which arbitrators had within the framework of Castilian law. This situation can equally be verified in the few rules sent to the Indies for the regulation of this matter³⁵.

The most remote references on jurisdictional duality, namely: judges sent by the King and jurisdiction following the parties’ will– was already regulated in the *Fuero Juzgo*³⁶. Recesvinto himself mentions in another law the resolution of conflicts by means of *pleytos o abenencias entre sí* [lawsuits or consent settlements with one another] thus confirming the double option to which the parties involved could submit themselves³⁷. This same King established the possibility to resolve *pleytos* either through a *mandado del rey* [one of the king’s subordinates –*who might be a duke, a count, a vicar or other judges*- or following the parties’ will. Nevertheless, the name given to those who did it by royal delegation was the generic term *judge*, thus recognising the nominal duality between those who judged on the king’s behalf and those who did it following the parties’ will³⁸.

³⁴ These premises find their legal referent in the Castilian law sources; *Partidas*, III, 4, 26 and 27; *Recopilación de Castilla*, Book II, t. 4; t. 5, 6, 13 and 17, and t. II, 2; Libro III, t. 9, 3 7 and 8; Book IV, t. 21, 4, t. 25, 13; Book V, t. 16, 1 and 2.

³⁵ *Recopilación de las Leyes de Indias*, Book II, t. 16, 81.

³⁶ *Fuero Juzgo*, II, tit. I, 25.

³⁷ *Fuero Juzgo*, II, tit. I, 26.

³⁸ *Fuero Juzgo*, Book II, t. I, law 25.

There are also references to *consent settlement* in Castile's *Fuero Viejo* [Old Charter], which established the parties' compromise as an essential requirement for such a solution to be valid.³⁹ This criterion was maintained in the *Fuero Real* [Royal Charter] by virtue of the consensus opinion that consent settlement seekers could reach.⁴⁰ *law arbitrators*, *arbitrating arbitrators*, *arbitrating judges* or *consent settlement judges* are common terms among the legal doctrine texts when they refer to the individuals appointed by the parties to wage the battle with one another and, therefore, to agree on a solution to their problems, as is regulated in the *Partidas*⁴¹. It is precisely the *Partidas* law that insists on some nuances which will permit to identify the institution as opposed to other interventions⁴². The fact that the arbitrators or *alvedriadores* are *communal friends* chosen by *consent settlement of both parties* establishes the requirements needed for such an intervention to be legitimate. An important role was exerted by the so-called *omes buenos* [good men], whose intervention was confined to the amendment and correct execution of the agreement or sentence settled by the parties when it was finally not implemented for reasons alien to their good will. In this respect, the *Partidas* determine that *the omes buenos for this case should be selected by the local ordinary Juezes* [judges].⁴³

Conceptual diversity can equally be appreciated in the legislation of Muslim communities residing in the Spanish territory, from the notarial forms of the 10th and 11th centuries to the Moorish Laws or the *Miy'ar* of al-Wanšarisi. This fact is common to the legal systems which remained in force for centuries within the peninsular territory when dealing with arbitration⁴⁴. In Andalusí legislation, the arbitrator or 'mayor-arbitrator,' sought consent settlement, *reached the agreement* (*ṣālaḥa*) with the parties, or favoured concord, thus avoiding enmity or growing distance between those parties as a result of the lawsuit. The term had the same scope and meaning in Muslim communities. Consent settlement meant peace and transaction by means of a covenant or pact between parties. In turn, and following the doctrine of Ibn 'Arafa, it implied

³⁹ *Fuero Viejo de Castilla*, III, tit. 3.

⁴⁰ *Fuero Real*, Book II, t. 13, 4.

⁴¹ *Partidas* III, 4. 23.

⁴² *Partidas* III, 18.106.

⁴³ *Ibidem*.

⁴⁴ *Leyes de Moros*, op. cit., Tit. CCII, page 158.

relinquishing the right to act before the court and continue with the lawsuit in return for a compensation. This type of agreements were undoubtedly favoured by the desire to reach an out-of-court agreement, either carried out by the judge himself or at one of the parties' request, and were always regarded as the best solution or consensus solution to an imposed solution. This sort of consent settlements would be justified as a form of conciliation.

The aforementioned distinction was consequently made in the Peninsula both within the Christian world and in the medieval Muslim context until the moment of Muslims' expulsion. However, there are hardly any references to consent settlement in the Maliki doctrine and, although Saḥnūn deals with this topic in the *Mudawwana* (in one of its chapters), the mentions of this modality are those made explicit in the notarial forms and in Moorish Laws, since the *Suma de mandamientos y develamientos* [Sum of orders and disclosures] does not treat this issue either⁴⁵.

The Andalusí sources –considering as such the work of al-Wanṣarīsī– refer to justice delegation by one of the first caliphs, 'Umar in favour of the *judges-arbitrators of Islām*. Such delegation was granted to province governors once the new territorial organisation of the Islamic Community, the *Umma*, had been consolidated⁴⁶. In this respect, the introduction of the term *qāḍī*, which replaced that of arbitrator or *ḥakam*⁴⁷ would come as the effect resulting from the design of a new jurisdictional level in keeping with the Koranic principles⁴⁸. Another outstanding characteristic was the arbitral nature of that early justice administration; and it is precisely here that the justification of the Islamic qadiship institution lies. Arabists have highlighted the clear arbitral nature associated with the exercise of functions by the early judges of Islām; in fact, they were arbitrators who acted as mediators in conflicts related to estates and inheritance regime. They were additionally competent in moral and spiritual issues.

⁴⁵ Chalmeta y Marugán highlights the survival of this modality in the Andalusí legislation in the edition of the notarial form by Ibn al-'Aṭṭār (op. cit., page 650).

⁴⁶ GAUDEFROY-DEMONBINES, "Notes sur l'histoire", op. cit., pp. 112-114.

⁴⁷ This change is justified by Tyan from the relationship between the term 'judge' and the equivalent Arabic term. (TYAN, E., *Histoire de l'Organisation*, op. cit., page 98).

⁴⁸ Also this sort of powers could be the object of delegation, as can be deduced from the proxy deed of a universal power to claim rights, obtain them, appeal against oaths, receive their rights, sell and purchase on behalf of third parties and reach agreements on their behalf. (see Ibn al-'Aṭṭār, op. cit., mod. No. 196, page 754).

Hence the agreement on the fact that the first judges in the Arab world did not perform exclusively judicial roles, they also had powers to deal with other matters referred to the religious context.

Following a sequential order, it can be said that the frequency with which the terms arbitrator, arbitration, setters of broken agreements, consent settlement and consent settlement seekers appear in Spanish law contrasts with the exceptional character that their presence has in the law transferred to the Indies. *Leyes de Indias* [Laws of the Indies] advise against receiving *arbitramentos*⁴⁹ [arbitrations] in reference to the possibility collected in the *Partidas* for the intervention of ‘fact-oriented arbitrators’ and not ‘law-oriented arbitrators.’ More precisely, law-oriented arbitrators were the ones who acted as mediators between the parties, but taking as a basis the regulatory framework, and who did so in matters related to irrigation within Muslim communities; the former actually came to be known as *alcaldes arbitros*, although they developed an independent, complementary and consensus-based jurisdictional function if it was deemed appropriate⁵⁰.

In Indiano legislation, this intervention modality occurred for a specific business, as shown by the appointment of arbitrating judges and friendly setters of broken agreements by Riberol and Juan Sánchez before a “certain difference and lack of accord” with respect to the frame with Vicente Yañez Pinçon, on May 19th 1506⁵¹. The appointment fell upon trustworthy people –Eduardo Escaja and Francisco de Bardi– who had full powers; they were given an eight-day period to solve the case in question, a term or period which was in tune with the line followed for these affairs in the peninsular context, in accordance with the provisions contained in the Bilbao Consulate ordinances⁵², and were granted the power to appoint a third person in case of doubt. The decision adopted by these broken-agreement-setting arbitrators will be firm, and should it not be abided by, a fine-penalty of 100,000 maravedis could be imposed.⁵³

⁴⁹ *Partidas* III, 4.23. About voluntary and forced arbitration, see *Partidas*, III, 18.106 and 4.23 and 36.

⁵⁰ *Leyes de moros*, op. cit., tit. CCII, page 158.

⁵¹ GIL, J., “La cuentas de Cristóbal Colón”, op. cit., pp. 430 and ff.

⁵² “āprocurarán atajar entre ellos el pleyto, y diferencia que tuvieren, a la mayor brevedad posible.” *Ordenanzas del Consulado de Bilbao*, chap. I, tit. VI.

⁵³ *Partidas*, III, 18.106 and tit. 4.23 and 36.

The exercise of that same voluntary jurisdiction, which stemmed from the agreement reached by both parties, became evident in the intervention of Eduardo Escaja and Francisco de Bardi as arbitrating judges and friendly settlers of broken agreements, to deal with an issue related to a “certain difference and lack of accord” between Riberol and Juan Sánchez, about the frame, with Vicente Yañez Pinçon on May 19 1506⁵⁴. The two abovementioned men fulfilled all the requirements which could be demanded for this sort of intervention: wholly trustworthy individuals, and with full powers. Nevertheless, the succession of moments and the demand for requirements for these people’s performance revealed the profile of a solid institution which followed the doctrine and had certain jurisdictional connotations as well.

III. Requirements, qualities and powers that could be demanded from arbitrators and consent settlement judges

The designation and appointment of arbitrating judges was subordinated to the acknowledgement of some qualities in the people who were close to the parties in conflict, as is collected in the Castilian regulations. Nevertheless, the appointment corresponded to the parts in conflict or to their representatives, who were freely selected to resolve the matter⁵⁵. The requirements demanded from arbitrators according to the aforementioned sources⁵⁶ were bonhomie, the ability to listen, wisdom and openness in their actions⁵⁷.

Regarding the way in which arbitrators acted, it is also necessary to highlight the surprising importance given to the compulsory hearing for both parties, before making any statements about the issue to which the lawsuit referred and the fact that these individuals’ intervention is plural or collective, generally two judges-arbitrators or

⁵⁴ GIL, J., “La cuentas de Cristóbal Colón”, pp. 453 and ff.

⁵⁵ Forced arbitration which, in mercantile matters, implies the ex-officio designation by the competent judge when the parties are unable to reach an agreement is a different matter. MERCHÁN, op. cit., page 104. About the voluntary designation of the parties, see *Partidas*, III, 4, 23.

⁵⁶ Also called *consent settlement judges* as is collected in the *Fuero Viejo de Castilla* which analogously uses the term ‘friends’ to offer an indirect description of those who intervene between the parties (*Fuero Viejo*, III, 1.1); according to the *Partidas*, they are law-oriented arbitrators or *jueces ordinarios* [ordinary judges]” (*Partidas*, III, 4.23).

⁵⁷ About causes of incapacity and those which are not, see MERCHÁN, A., op. cit. pp. 78-102.

more⁵⁸. We should also stress the meticulous regulation of the time⁵⁹ and places suited to the exercise of this function, which referred back to the same action patterns as in the case of ordinary judges⁶⁰. The agreement between the parties finished with the acceptance of the so-called ‘*compromise letter*’ which is repeatedly mentioned in the *Partidas* and has its precedent in the *Fuero Viejo de Castilla*.⁶¹

Similarly, the *ḥākim*⁶², or *ḥakam*⁶³ -described as a good mediator according to Andalusí notarial forms- had to display a number of qualities or faculties: firstly, being able to listen and, secondly, having the ability to reflect on what is said before him with the aim of achieving peace where discord prevailed through a well-reasoned solution⁶⁴. Already in the times of Aljoxani, the figure of judge Abdalà was praised for being a balanced person with a calm spirit who did not get annoyed or angry at the plaintiffs’ declarations and, instead, used his will, intelligence, care, reflections, wit and words to reconcile the parties and achieve a consent settlement between them, always trying to treat them fairly and equitably.⁶⁵

The arbitrator in Andalusí communities was not a person with a long experience in politics and did not have any affinities with one group of people or another: he was a single *judge* who, in principle, did not need the assistance of advisors, as his own qualities made him worthy of the trust that litigants placed on him. Two new conclusions can be inferred from this: the first one, the private nature of a pre-Islamic

⁵⁸ *Partidas* III.18.106 and 107. About references to this issue in Foral [Territorial Charter] Law, and more specifically in the *Fuero de Sepúlveda*, see MERCHÁN, A., op. cit., page 106.

⁵⁹ It was not advisable to give solutions on public holidays, unless it had been agreed by the parties. *Partidas* III, 4.32.

⁶⁰ In relation to the place where arbitration could be exerted, see *Partidas*, III, 4, 27. The doctrine takes up these issues again through Gregorio López on the basis of the aforementioned text and all that is regulated in the *Partidas*, III.4.32; about this matter, see MERCHÁN, A., op. cit., page 181.

⁶¹ *Fuero Viejo de Castilla*, III, tit. 3 and *Partidas*, III.18.106. You can find the analysis and historical evolution of this arbitral agreement in MERCHÁN, A., op. cit., pp. 157-168.

⁶² TYAN, E., s.v. “*ḥākim*”, *EP*, op. cit., page 72.

⁶³ As for Andalusí sources, readers interested in these etymological issues can consult the work of Pando Villaroya; s.v. *Hakam*, from the root *hkm*, a term to which different acceptations are assigned; among them Pando mentions: to administer justice, to decide, to pass a sentence, to provide, to rule or adopt a decision [at the court]; the term *hakm*, however, is reserved for the arbitrator, judge and mediator; whereas it means ‘wise [man]’ when vocalised with a *kasra*. PANDO VILLARROYA, J. del, *Diccionario de voces árabes*, Toledo, 1997, page 447. MAÍLLO, F., *Diccionario*, op. cit., pp. 112-113.

⁶⁴ TYAN, E., *Histoire de l'Organisation*, op. cit., page 39. The sentence was pronounced after hearing the parties and assessing the arguments against or in favour of the claim filed before him.

⁶⁵ ALJOXANI, *Historia de los jueces de Córdoba*, Editoriales andaluzas unidas, Sevilla, 1985, page. 58.

institution; the second, the unicity of the post, which did not need *ad hoc* bodies during the exercise of mediation⁶⁶.

In addition to all these requirements, he had to fulfil a number of conditions regarding his action as a mediator; for this same function he was regarded as a ‘judge’ able to give a response to the questions posed equitably and without any superior hierarchical dependence. Being a single judge, he did not need the assistance of advisors; his wisdom and knowledge stood among his most highly appreciated values, making him worthy of the trust placed upon him by those who came before him in search of an arbitral solution (*tahkim*) rather than a *sentence*⁶⁷ (*hakama* o *hukm*⁶⁸), which is the instrument of the *qādī*. That is why the resolution of disputes or controversies channelled via arbitration only had civil effects. Therefore, the arbitrator perpetuated over time his role as a conciliator of the parties, without subjective assessments or interpretations.⁶⁹

Regarding the dynamics in his actions, the mediator or arbitrator went to the office of the *qādī*, every day and discussed with the latter those issues which had been brought before him; a man of good habits and owner of good qualities such as integrity, incorruptibility, impartiality and knowledge of the *fiqh*⁷⁰, and with enough means not to covet goods that could turn him into a bribery suspect⁷¹.

From the very beginning, the *hakam*⁷² was considered the good mediator between individuals immersed in a conflict situation. Inherent to his condition as a

⁶⁶ MARTÍNEZ ALMIRA, M^a M., “Derecho procesal e inmigración: la figura del árbitro (*hakam*) en el Derecho musulmán” in *Mediación social intercultural. Materiales del Curso de Formación 2002/2003* held at the University of Alicante, Alicante, 2004, pp. 55-70.

⁶⁷ TYAN, E., *L'Organisation*, op. cit., page 39. The sentence was passed once the parties had been heard and their arguments against or in favour of the petition filed before him assessed.

⁶⁸ Term which, as a legal arbitration, is the action inherent to the *hakam*, Idem, op. cit., page 237. CORRIENTE, F., *A dictionary of Andalusí-Arabic*, Brill, 1997, page 134.

⁶⁹ TYAN, E., in *L'Organisation*, op. cit., page 51.

⁷⁰ ‘Religious law’ revealed to Muslims (*Shari' a islamiya*) to regulate exclusively the external context; various characteristics are attributed to this law: sacrality, denominationalism, personality, its value as an ethical rule, its out-of-statute value, its imperative value, immutability. (CASTRO, F., “Diritto musulmano” in *Enciclopedia Giuridica*, op. cit.). For readers interested in the characteristics of the *Fiqh* and their consideration over time, see the study published by HALLAQ, B., *Authority, continuity and change in Islamic Law*, Cambridge University Press, Cambridge, 2001.

⁷¹ IBN 'ABDŪN, *Sevilla a comienzos del siglo XII*, op. cit., page 58.

⁷² By derivation, this term gives rise to another which denotes the development of an arbitral procedure within the Islamic framework: *tahkim*; it even comes to mean more precisely the submission to arbitration, a usual practice in pre-Islamic Arabia before the absence of a public power which was

mediator were a series of qualities which entitled him to act with the approval of his fellow citizens. He was a reflexive person able to listen and intervene without passion who knew how to keep a distance without showing empathy towards one party or the other and could express a balanced and well-reasoned opinion. In short, the *hakam* was a person who issued an objective and fair opinion for the purpose of reaching an agreement between the parties in conflict and settling a lawsuit that was difficult to resolve.

IV. Powers of arbitrators and settlers or broken agreements

The definition of the powers corresponding to the judges-arbitrators had an objective nature, not only in the Castilian legislation but also in the Andalusí legislation of the late medieval times. The limitations in the exercise of their functions were due to reasons linked to the objective competence scope, dealing with issues regarded as less important⁷³ -as it also happened within the framework for the application of law in the Muslim communities who resided in the territory of the Iberian peninsula⁷⁴-, or to conflicts between individuals belonging to the lowest social classes, for whom conciliation was sought⁷⁵.

This conflict resolution modality had a private character during the pre-Islamic period and, in fact, its intervention was verified before those causes which implied the application of revenge, *ta'r*. In the East, those judges who were competent in lawsuits

representative of justice administration. This justifies the private character of justice in the moments that preceded the advent of Mohammed. The survival of the system, even after the proclamation of Islam, led to a long period of coexistence between a private justice system, where the supreme arbitrator is Mohammed, and the consolidation of a justice system supervised by the highest political authority, the caliph in this case. In this respect, see TYAN, E., entry "*hakam*", *EF*, op. cit., page 72.

⁷³ *Partidas* III, 4.24.

⁷⁴ There are few references to the process object; this circumstance makes it impossible to establish categorically which cases came under the competence of the *qāḍī* and which had to be assumed by the *hakam*. Although the sources consulted contain scant news of this matter, we provide here a review of Arévalo about the oath carried out in the mosque as a means of proof; according to his sources, when the lawsuit involved a sum exceeding a 1/4 of dinar, the oath had a solemn character, but it did not have this character if the sum involved was less than 3 dirhams or a 1/4 of dinar. This contribution would permit to draw a distinction between major and minor issues (ARÉVALO, *Derecho penal musulmán*, op. cit., page 134).

⁷⁵ IBN 'ABDŪN, *Sevilla a comienzos del siglo XII*, op. cit., page 53. The profile of this Andalusí judge in LEVI PROVENÇAL, E., *L'Espagne musulmane au Xe siècle*, Paris, 1932, page 83.

with a lower quantitative value had the consideration of special judges and could deal with issues that did not exceed the amount of two-hundred and twenty dirhams, additionally coming to be known as *justices of the peace*⁷⁶. With the advent of Islām, revenge was regarded as going against the principle of legality, which justified the loss of the specific weight which the arbitrators' intervention had had until that moment. The *ḥakam* was now subordinated to the *qāḍī*, who had the final word about his designation, appointment or removal from office.⁷⁷ Nevertheless, his qualities as a mediator made him worthy of the judge's trust and, therefore, the judge allowed him to intervene on the first phase of litigation for the achievement of conciliation.

In the Islamic world, the *judge-arbitrator* exerted his functions at the 'court house,' that is, in the mosque or at its esplanade, ruling over all the voluntary jurisdiction acts.⁷⁸ In al-Andalus, the *ḥākam* dealt with issues between the Book People, *aḥl al-Kitāb*, as is shown in the *Moorish Laws*.⁷⁹ However, these arbitrators only dealt with specific issues for the case to which they gave a solution, without that creating any jurisprudence whatsoever.⁸⁰

Thus, for example, Muḥammad b. 'Iyāḍ⁸¹ puts forward an issue about the right of an irrigator to the water which corresponded to him for the irrigation of his vegetable and fruit garden, thanks to the construction of a mill in the vicinity of his lands. In the case, the plaintiff is given the possibility to make an oath before the arbitrator who decides fairly and honestly about these issues, *maqṭa al-ḥaqq*⁸². Similarly, and a posteriori, among the Muslim communities under Christian authority⁸³, their *qāḍī* was authorised to take

⁷⁶ TYAN, E., *L'Organisation*, op. cit., page 104.

⁷⁷ Those news items cover from the first sources kept, as it will be shown in subsequent headings, until the 15th century with the data provided by the *Summa de los principales mandamientos y develamientos de la Ley y çunna*, ed. Gayangos, op. cit., chap. XLV, pp. 365 and 367.

⁷⁸ ALJOXANI, *Historia de los jueces de Córdoba*, op. cit., page 172.

⁷⁹ *Leyes de moros*, op. cit., TIT. CCII, page 158.

⁸⁰ IBN 'AṢIM, *Tuhfat, Tuhfat, La Tohfāt d'Ebn ...*, *Texte arabe avec traduction français, commentaire juridique & notes philologiques*, transl. O. Houdas & F. Martel, Alger, 1882-1893, chap. II, 23, page 13.

⁸¹ MUḤAMMAD B. 'IYĀḌ, *Madāhib*, op. cit.

⁸² Term formed by two words, the first one of which came for the verb of the root *q.t.a'* 'cut,' CORRIENTE, F., *Diccionario árabe-español*, op. cit., pp. 631 and 633. CORRIENTE, F., *A dictionary of andalusí arabic*, op. cit., page 132.

⁸³ In the *Leyes de moros*, even though no explicit mention is made of these officials specialised in risk matters, there is indeed a reference to the figure of the *árbitros* o *alcalles arbitros* [arbitrators], to whom is recognised the jurisdictional function with an independent character, but also complementary or agreed if necessary (*Leyes de moros*, op. cit., tit. CCII, page 158).

two good men and order them to *put on a level and reach a consent settlement* between the litigators so that they would not get lost in lawsuits⁸⁴. In any case, consent settlement at the request of the *qāḍī*, himself was preferred to the litigation taken to its last consequences, as it could happen in the case of physical injuries. Under identical premises, the parties involved in a lawsuit could resolve an issue by means of a transaction, an intention which had to be made known to the judge, who could freely accept it or deny it. In accordance with what has already been explained, the usual thing was for the judge to accept the agreement on the grounds that that the fraternal bonds between Muslims were strengthened in that way; so it happened in the case of a consent settlement deed between the curator of vacant inheritances and the heirs⁸⁵.

The sphere of commerce was undoubtedly the most prone to these sort of arbitral interventions, as it occurred in peninsular mercantile law too, and more precisely in the context of the Bilbao Consulate, where priors and consuls had to try to achieve conciliation between the parties before any claim⁸⁶. Therefore, agreement between the parties in the world of commerce was also a usual conflict resolution method among the members of the Islamic community based in Spain during the 15th and 16th centuries. An example of this is the arbitration case which took place on January 14th 1493 between two siblings of a prestigious family from Saragossa. Unlike what has been seen so far, three people intervened in this case: Yuso Xama, *mayor de días* [legally of age], Yusuf Abdón, alfaki, and Abadía Abdón, carpenter, who resorted to the wisdom of the arbitrators Yusuf Allabar, medical doctor by profession, and Javel Gali, merchant, to settle certain differences of an economic nature⁸⁷. As it was customary, the arbitrators had been selected for their prestige among their fellow believers as is verified with respect to Xama, and because they fulfilled the legal requirements regarding age. This exigency was also collected in Castilian law, contemplating the possibility for them to

⁸⁴ *Suma de los principales mandamientos*, op. cit., tit. XLV, page 367.

⁸⁵ IBN AL-‘AṬṬĀR, op. cit., mod. No. 171, page 661.

⁸⁶ *Ordenanzas del Consulado de Bilbao*, chap. 1,6.

⁸⁷ ABELLÁN SAMITIER J., “Una familia de mudéjares aragoneses en el tránsito de la Edad media a la Moderna: los Xama de Zaragoza” in *la España Medieval*, 28, 3-4 (2005), pp. 197-212.

be below 18 years of age as long as this was known by the setters of broken agreements but, at any rate, older than 14⁸⁸.

The second competence framework for arbitrators was the family. Submission to arbitration in marital conflicts was discouraged in the context of Christian communities following the *Partidas* law.⁸⁹ However, arbitrators could act as mediators in issues related to betrothal –as it had also happened in Andalusí law from the times of Ibn al-'Aṭṭār– since these matters referred to the private sphere of marriage and did not interfere with its *sacramental aspect*. They similarly intervened in disputes which had to do with tutelage and curatorship⁹⁰. The *Style Laws* mention the presence of good men – without specifying the number– to take good care of the debts incurred by the husband in his condition as steward or *arrendador cogedor* [landlord] so that the wife could be exonerated from any guilt associated with her husband's embezzlement of funds⁹¹. However, cases about nullity, separation and divorce were an exclusive competence of ordinary jurisdiction.

Within the Islamic legislation, the arbitrator or *hakam* was an expert in the resolution of conflicts arisen in the context of the family and, more specifically, in relation to spouses. From time immemorial, the arbitrator had been entrusted with the rapprochement between spouses in the case of separation and divorce; he additionally intervened in the distribution of goods after the rupture of the matrimonial contract or the death of one of the spouses.

Not in vain, the Koranic text justifies the intervention of arbitrators when spouses were in the process of breaking up, encouraging the selection of one arbitrator for each one of the spouses' families with the aim of achieving reconciliation⁹². This practice does not seem to have been followed strictly in Al-Andalus and its application among Christian communities was also uneven.

⁸⁸ *Nueva Recopilación*, 4,1,11; the aforementioned regulations stipulate that individuals who had reached the age of 14 could be arbitrators and so could men below 18 years of age as long as this piece of information was known by the 'committees.'

⁸⁹ *Partidas*, III, 4, 24.

⁹⁰ *Partidas*, IV, 10. 7 and 8.

⁹¹ *Leyes de Estilo*, 223.

⁹² Kor., IV, 39/35 and Kor. IV, 127/128.

On the other hand, the communities ruled by Maliki law permitted the intervention of these arbitrating judges in discrepancies between spouses with the possibility to annul the marriage contract. This prerogative was not awarded to other sorts of arbitrators or setters of broken agreements such as the *amīn*. Ibn Sahl in his work *al- Aḥkām al-kubrā* describes the Andalusī practice of sending the *qāḍī* to an *amīn* -a man trusted by the couple who could even stay with them- to the home of the spouses who had fallen out when two arbitrators from their families were not available.⁹³ This practice, which comes into conflict with the Maliki doctrine and even permits to question its exercise, took place before the entry of the Mālik school into the peninsular territory.⁹⁴

If, otherwise, the husband finished with the wife's repudiation and they did not reach an agreement on any of the economic aspects associated with the wife's support or the payment of the dowry remainder, they could litigate before the judge of the locality where they resided. Once the lawsuit had started, they kept the right to reach an agreement through the conciliation of opposite wills; once the discrepancies were resolved in this peaceful way, they lost any expectations of a right to file a new claim, to present evidence, to make an oath or to demand any responsibilities.⁹⁵

The third specific area for the achievement of arbitral agreements was inheritance law. This conflict resolution modality was applied both within the framework of late medieval and modern Christian legislation and within that of Andalusī legislation; and more specifically in cases related to inheritance allocation between adults, minors under curatorship and the widow.⁹⁶ Notarial forms use the term *consent settlement* when they refer to the agreement between the executor and the father of a widowed woman about the liquidation of the *kālī'* or the dowry remainder; an agreement which represented approval regarding the said liquidation, to the legitimate or natural portion, and the part corresponding to her support in accordance with the law.

⁹³ IBN SAHL, *al- Aḥkām al-kubrā*, Doctoral thesis by Rashid H. al-Nuaymi, University of Saint Andrews, Saint Andrews-UK, 1978, (Microfiche edition), vol. II, page 397.

⁹⁴ Divergences between authors described by Fierro in her study about the figure of the two arbitrators in al-Andalus (FIERRO, M^a I., "Los mālikies en al-Andalus", op. cit., page 88).

⁹⁵ IBN AL-‘AṬṬĀR, op. cit., model No. 173, page 666.

⁹⁶ The intervention of the arbitrator or arbitrating judge was optional in all these cases, and so was the subjection of the matter to a judicial resolution. (*Fuero Juzgo* 10,1,2, *Fuero Real*, 3,4,8, and *Partidas*, VI,15.9).

Nevertheless, the consent settlement was compulsory in any case for the fact of refusing to make an oath, since that refusal was considered a proof of the debt towards the widow's parents recognised by the deceased. The legal effect of consent settlement was the impossibility to invalidate the agreement in the future⁹⁷.

Despite not having a counterpart in our current law and at least in accordance with the characteristics that are inherent to it in Muslim Law, this institution still remains a referent for the population of Islamic denomination in our country. This fact could be taken into consideration in the light of conflicts related to marriage which arise between Muslims and non-Muslims nowadays for the purpose of finding a solution prior to the intervention of justice.

In fourth place, arbitrators played an outstanding role in relation to the commission of certain crimes. Consent settlement, agreement or composition were the most effective ways to encourage a pact between the parties involved in the commission of crimes which entailed the application of the “eye for an eye” law (*lex talionis*). In fact, the consent settlement, *ṣulh*, before the commission of violent crimes implied withdrawing the accusation and thus, *lex talionis* was replaced with a pecuniary penalty, a composition or a *diya*. In the case of death of a person who left heirs –and should one of them decide not to make a sworn accusation against the aggressor, reaching a consent settlement or a personal agreement with him- he relinquished the *qasāma* for his refusal, the remaining heirs –collateral or descendants- not having the right to demand the aggressor's death; only the blood price share corresponded to them.⁹⁸

The right to revenge in pre-Islamic times fell upon the tribe and, more precisely, upon the victim's closest relative. This justifies the non-existence of a judicial process, as we are going to explain in more detail later on. During that same stage, the execution means were not subject to any control or regulations, and sons, descendants or brothers were allowed to use some modalities considered seriously harmful to the individual. The lawfulness of the act was *guaranteed* through the publicity given to the act performed. This had a twofold objective: firstly, to legitimise the use of violent force to avenge the harm caused; and secondly, to intimidate the remaining group members with

⁹⁷ IBN AL-‘ATTĀR, op. cit., mod. No. 6, page 90.

⁹⁸ IBN AL-‘ATTĀR, op. cit., mod. No. 116, and No. 181, pp. 509 and 682, respectively.

respect to analogous behaviours which could entail the application of an identical punishment. This sort of interventions remained within the spiritual sphere and turn vengeance, *ta'r*, into a compulsory action towards the achievement of peace for a wandering soul still to be avenged.⁹⁹

This practice was favoured with the passing of time and, perhaps, with the contributions of other cultures and ideological influences; so much so that revenge gradually lost relevance in front of the voluntary composition system. There is actually evidence of assessments for crimes committed in favour of cattle heads or other material goods, and that although relinquishing revenge entailed a shameful consideration for the person.¹⁰⁰ This change led to question the role played by the judge-arbitrator, who only intervened when controversy arose in relation to one or some of the elements included in the obligation to pay the composition, through an appeal or summons by the damaged party. In these cases, he could resolve this issue, as he could equally do in relation to the amount of the *diya*¹⁰¹ corresponding to homicide. Therefore, the commission of violent crimes on which *lex talionis* had to be applied –homicides and body injuries– will be the fact justifying the judge's presence in the search for a more *right-protective* system.

Finally, this sort of *mediation* also occurred at other levels like, for instance, border relationships with the so-called delegates and mediators. This modality takes us to the times when the Reconquest process is a widespread fact in peninsular kingdoms, and the relationships between Christian and Muslim communities become more complicated due to various circumstances which materialise in actions such as taking hostages from one group or the other for the purpose of influencing the policies adopted by one side or the other. As a matter of fact, in accordance with the Muslim practice, the local powers were authorised to carry out short-scope (short-term) negotiations¹⁰². This negotiation gave legitimacy to the officials who acted in the capacity as *mayors between*

⁹⁹ TYAN, E., *Histoire de l'Organisation*, op. cit., page 31.

¹⁰⁰ TYAN, E., *Histoire de l'Organisation*, op. cit., pp. 31-33.

¹⁰¹ See entry '*diya*' in *EP*, op. cit., vol. II, Leiden, 1991, pp. 340-343.

¹⁰² About border relationships see RODRIGUEZ MOLINA, J., "Relaciones pacíficas en la frontera con el Reino de Granada" in *Actas del Congreso La frontera oriental nazarí como sujeto histórico (s. XIII-XVI)*, Almería, 1997, pp. 257-290). (see PORRAS ARBOLEDAS, P., "El derecho de la frontera durante la Baja Edad Media, La regulación de las relaciones fronterizas en tiempo de treguas y de guerra" in *Estudios dedicados a la memoria del Prof. L.M. Díez de Salazar Fernández*, Bilbao, 1992, pp. 261-287; and LÓPEZ DE COCA CASTAÑER, "Institutions on the Castilian-Granada Frontier, 1369-1482" in R. Bartlett & A. Mackay (eds.) *Medieval Frontier Societies*, Oxford, 1989, pp. 127-150.

Christians and Moors or *border judges*, whose actions had been known since the times of Mohammed II and the Castilian reign of Enrique II¹⁰³, and who were given the name of *alfaques*, from the term *al-fakih* or expert in Muslim Law¹⁰⁴.

V. The exercise of arbitration for the achievement of a consent settlement

Late-medieval and modern Castilian legislation contemplated the possibility of consent settlements as the most effective way to resolve a conflict which could take place at any time, even in any procedure stage¹⁰⁵. Just like this concept is subjected to regulation in Castilian Law¹⁰⁶, Andalusí law assumes the suggestions of legal experts on the basis of Koranic principles. One interesting aspect in this sense has to do with the periods established by the Muslim doctrine for the exercise of arbitral mediation.

After verifying the capacity and moral qualities of the person before whom the object was brought as well as the arbitrators' suitability –it was actually seen as praiseworthy in this respect when the individuals designated for this role even relinquished the proposal made by the parties concerned- he assumed his commitment with some precautions. Having accepted the assignment, the *ḥākim*, established his conditions: he demanded guarantees for the execution of his decisions. Those guarantees were only fixed by him in a discretionary way, without this meaning that his decision had executory strength, as he was not an official authority but a mediator who acted on a privative basis. Nevertheless, his intervention was surrounded by a certain amount of paraphernalia, which consisted in an initial invocation of divinity so that God could help him to adopt the right decision about the matter where he intervened. This requirement might have been the antecedent for the formulas of invocation and praise to

¹⁰³ In Arabic, the term 'decision' coincides with the word *kaḍā'*, or decision among its numerous acceptations regarding jurisdiction and, from a technical-legal point of view, it means the "payment of a debt" (Schacht, J., *An introduction to Islamic Law*, Oxford, 1964, page 148). Among the diverse meanings stands out that of 'sentence which cannot be appealed against' (Schacht, op. cit., page 196), although the term "pay the debt" seems more appropriate to me in this case; see *EF* op. cit., t. IV, 1990, s.v. *kaḍā'*, pp. 364-365. About the term *qāḍī*, see *EF*, op. cit., t. IV, 1990, pp. 373-375.

¹⁰⁴ TORRES FONTES, J., "Los alfaques castellanos en la frontera de Granada, *Homenaje a Don Agustín Millares Carlo*", Gran Canaria, 1975, pp. 99-116.

¹⁰⁵ *Recopilación de las Leyes de Castilla*, IV, 21.4 and *Novísima Recopilación*, XI, 17.4.

¹⁰⁶ These periods affected both the announcement of the solution or proposal for a solution and the compliance of that proposal; *Partidas* III, tit. 4, 32 and laws 32 and 34, respectively.

Allāh, which appear at the beginning of all the decisions or opinions coming from Islamic judges.¹⁰⁷ A ceremonial followed at the site where his performance was taking place, which was usually his own home, where he proceeded to listen carefully to everything that the parties in conflict had to say.

Arbitral decisions were also surrounded by a number of precautions, a fact which permits to speak about a certain degree of ‘formalism’, something that also happened in Castilian law.¹⁰⁸

The mediating task performed by the first judges-arbitrators extended over time with a series of guarantees fixed by Muslim Law, which forced qāḍīs to request the advice and support of alfakis for the exercise of justice¹⁰⁹. The development of the process before the qāḍī implies the utilisation of legal instruments in favour of one of the parties. This makes it possible to deduce the presumption of innocence for the defendants, who are not deprived from the right to defence through the customary means: confession and testimonial evidence with the oath of the other party involved in the lawsuit. Furthermore, as it happened with the old pre-Islamic arbitrators, *ḥakam*, the judge’s mediation in the lawsuit demanded obligatory compliance of his decisions, guaranteeing execution through his direct involvement in it. This is a demand which has its corollary in the law applied to the Christian communities of that same period.¹¹⁰

The change operated in the foundations of Law especially affects the procedural sphere and thus, for example, a mixed procedural system which incorporated both the old accusatory system and the inquisitorial one became widespread. While the accusation came from someone other than the *ḥakam* in pre-Islamic times, thus giving rise to an eminently oral public procedure, the advent of *Islām* meant that the judge’s intervention was usually ‘ex officio,’ with a number of procedural formalities where orality prevailed.¹¹¹ The judge was competent for the verification of evidence and even

¹⁰⁷ TYAN, E., *L'Organisation*, op. cit., page 59.

¹⁰⁸ *Partidas* III, 18.15.

¹⁰⁹ We had previously mentioned those Koranic principles impacting directly on the justice and fairness of those in charge of justice administration; regarding respect for the legal precepts established in the Koran as rules of behaviour for Muslims, see *Kor.*, II,231; LXV,1 and IX,11; TYAN, E., *L'Organisation*, op. cit., page 247.

¹¹⁰ *Partidas* V, 14.34.

¹¹¹ Regarding the figure of the arbitrator in Muslim Law and more precisely in the Andalusí context, see MARTÍNEZ ALMIRA, M^a M., “Derecho procesal e inmigración” op. cit., pp. 65 and ff.

to search for it, which he could do resorting to the so-called ‘instrumental witnesses,’ the denial of rights to the defendant seeking to encourage the search for proofs or their collection (save for the oath) and the possibility to adopt procedural guarantee measures, which in some cases meant preventive detention ordered by the *qāḍī* himself¹¹².

Following the procedural *iter* [path], the plaintiff could provide evidence to support his petition¹¹³ whereas the defendant had to take an oath¹¹⁴. These requirements had their justification in the tradition attributed to Mohammed: *the evidence is incumbent on the plaintiff and the oath on the person who denies it*; this maxim was going to be kept in the territory of al-Andalus¹¹⁵. When the parties in conflict were present before the *qāḍī*, the plaintiff presented some evidence and the defendant could be ordered to take an oath at the plaintiff’s request. If the defendant kept his position with respect to the plaintiff, this forced the *qāḍī* to provide ‘solomonic’ or compromise solutions. This fairness measure could be disallowed by the defendant through an action where he reclaimed the part granted to his adversary. This generated a new lawsuit, *da’āw* and, once again, evidence presentation and oath taking¹¹⁶. It is additionally worth highlighting that the *ḥakam* could hardly intervene at this moment, let alone present evidence in favour of one party or the other. This same prohibition is contemplated in the Indiano doctrine, which reserves that power for the ordinary judge.¹¹⁷

It must be said that, despite these premises, Muslim Spain was a territory which attracted the interest of the most orthodox jurists because of the discrepancies regarding some of its legal solutions. By way of example, we can mention the issues where Malikis drift away (*ijtilāf*) from the doctrine of Mālik¹¹⁸.

¹¹² CASTRO, F., "Diritto musulmano", op. cit., page 14.

¹¹³ The doctrine justifies and motivates the decisions obeyed on the basis of these general procedural principles. A good example can be found in the minutes presented by Aḥmad b. Muḡīṭ; this can be read in nearly all of them: "it corresponds to the defendant (husband/wife, slave, debtor, etc.) to take an oath and it is incumbent on the plaintiff (husband/wife, the slave’s master, creditor and other different figures or cases) to present the oral evidence, and if it is not possible for him to request the other party’s oath before the *qāḍī*; AḤMAD B. MUḠĪṬ AL-ṬŪLAYṬULĪ, *Al-Muqni’ fi ‘ilm al-ṣurūṭ*, op. cit., pp. 368-381.

¹¹⁴ Ibidem.

¹¹⁵ AL-NUBĀHĪ AL-MĀLAQĪ, *al-Marqaba al-‘ulyā*, op.cit., page 42; *Llibre de la Çuna*, op. cit., tit. CCLXXXVI, page 79.

¹¹⁶ MUḤAMMAD B. ‘IYĀḌ, *Maḍāhib al-ḥukām*, op. cit., page 188.

¹¹⁷ HEVIA BOLAÑOS, *Curia Philipica*, Book. 2, chap. 14, No. 16, page 434.

¹¹⁸ FIERRO, M^a.I., "Los mālikies..", op. cit, pp. 92 and ff.

According to the Andalusí practice, the judicial intervention implied an agreement between the parties; in fact, the intervention of a third person seeking to achieve the agreement –whether it was a judge specifically designed for that purpose or another person alien to the process in his capacity as witness- was a reason to reach compromise through a settlement consent which could reconcile opposite positions. This agreement modality, *ṣulḥ*, took place once the hidden vice had been recognised at the courts and after the confession (*iqrār*) before the judge. In this way, Andalusí people found a justification for the possibility to carry out the consent settlement in the presence of a single judge-arbitrator, provided that the previous premises had been fulfilled.¹¹⁹ One of the requirements which could be demanded from a person who acted as an arbitrator in the disagreement situation was the oath taking. This was a usual formality among Andalusí people (*‘ama*) even though it went against Maliki orthodoxy¹²⁰. The demand for the arbitrator to take an oath after the acceptance of his appointment was also a requirement in Castilian legislation¹²¹, a circumstance which permits to question the similarity of options which existed both in the Andalusí context and in the Castilian context of a later period about the intervention of one or two arbitrators according to the sources.¹²²

The Koranic justification for the convenience of reaching an agreement between the parties for the good effects that it could have on them allowed the doctrine to justify that it was possible to reach an agreement at any time even in the course of an already initiated process. Nevertheless, the term ‘consent settlement’ understood as a harmony of wills does not seem to have developed outside the jurisdictional context in the law applied by the Andalusí communities. Indeed, when the claim referred to a hidden vice, for the case of a slave it was possible to reach an agreement or consent settlement which started immediately after encouraging the litigants to reach concord and agreement after the guarantee for loss of rights which resulted from the qadi’s ruling. Always under the condition of trying to achieve the divine reward and in accordance with the Koranic postulates, a third person encouraged the parties to reach an agreement following God’s

¹¹⁹ IBN AL-‘AṬṬĀR, *Formulario notarial y judicial andalusí*, op. cit., mod. No. 10, page 117.

¹²⁰ FIERRO, M^a.I., "Los mālikies ..", op. cit., pp. 81-83.

¹²¹ *Recopilación de las leyes de Castilla*, II, 5, 50; vid. *Nov. Recop.* 10,21,1.

¹²² ALJOXANI, *Historia de los jueces de Córdoba*, op. cit., page 199.

will too. This is the case in lawsuits related to violent crimes presented before the *zalmedina* in the city of Cordova for death and querulous accusation by the heirs. Even in this case, a consent settlement between the parties on the payment of the composition corresponding to a violent crime was clearly preferable to a judicial sentence that entailed prison and deprivation of one's freedom, a serious punishment which people preferred to avoid.¹²³

The consent settlement or agreement for personal damages could be considered once the accusation had been presented in all possible ways. The intervention of a third person in this case with the desire to set up an agreement between the parties was considered a merit in God's eyes¹²⁴ and it actually justifies that third person's invitation for the parties to reach a consent settlement. Nevertheless, although we cannot generalise, being a Muslim is highlighted in some of the references found in the Andalusí documentation consulted for this paper¹²⁵. Therefore, the consent settlement had a spiritual purpose for the mediator. Furthermore, the sources mention another two reasons for that preference: firstly, stopping the dispute or confrontation between the parties and secondly, avoiding the loathing and enmity caused by lawsuits. That is why this option would always be preferable to any other judicial modality, regardless of the procedural stage in which the dispute found itself, and while the victim was alive¹²⁶. In this case, the consent settlement consisted in the payment of a composition when there were injuries caused by violent crimes, with fixed assessed prices. Nevertheless, reaching a consent settlement with the aggressor before being healed clearly represented a risk for the victim. The situation was different if the victim delayed the compliance of the agreement in parallel with his recovery because, even though this meant including an *alea* in the agreement, the Maliki doctrine considered it licit.

The performance of the *ḥakam* developed in three moments or phases. The first one coincided with the appearance in court of those involved in the conflict. During the second phase, the arbitrator offered a hearing to the parties present, who explained their reasons. At this stage, it was necessary to prove the moral and personal conditions of the

¹²³ IBN AL-‘AṬṬĀR, op. cit., mod. No.181, pp. 682-685.

¹²⁴ “El acuerdo es un bien”, *Kor.*, IV, 127.

¹²⁵ *Ibid.*, op. cit., page 682.

¹²⁶ IBN AL-‘AṬṬĀR, op. cit., mod. No., 120, page 517.

parties in conflict. Finally, and once the reasons provided by each one of them had been heard, the *hakam* pronounced an arbitral decision.

The time allocated to resolving this type of controversy was apparently not limited. Nevertheless, the Castilian legislation established a maximum of three years from the moment of acceptance.¹²⁷ This deadline may be seen as excessively long considering that the parties were urged to find a solution before eight days elapsed in the battle waged between Riberol and Juan Sánchez. Along the same lines, the *Partidas* forbade any pressure on the consent settlement seekers, since such a situation might have hindered moderate and calm reflection.¹²⁸ In any case, this sort of decisions made by the broken agreement setting arbitrators were firm, and their compliance did not depend on the parties' wishes or whims¹²⁹; just the opposite, lack of compliance was punished with a fine of 100,000 maravedis.

The exercise of these functions generated a number of duties and rights for the mediating arbitrators, who had to perform their roles as if they were ordinary judges anyway¹³⁰. This responsibility –which was justified by virtue of the moral obligation towards those who received the administration of justice from them- demanded from the *alcaldes de avenencia*¹³¹ the achievement of a peaceful solution to the conflict arisen reaching agreements with respect to what would legally correspond to each one on the parties; but, should the *alcaldes* refused to look for a solution to the conflict, by virtue of the responsibility acquired, they had to *pass the sentence* in unison and solve the problem.¹³²

In the regulations sent to the Indies about this same issue, Felipe II in his ordinance of May 25th 1563 referred to the penalty of banishment from the *Audiencia* for 30 days and the loss of their salary for two months for those who *avogaran o recibieran arbitramentos* [defended or received arbitrations] regarding matters in which

¹²⁷ *Partidas* III, 4.27.

¹²⁸ *Partidas* III, 4.27.

¹²⁸ *Partidas* III, 4.29.

¹²⁹ *Partidas* III, 4.23.

¹³⁰ MERCHÁN, A., op. cit., pp. 118 and ff.

¹³¹ *Partidas* III, 4.23.

¹³² About this obligation and the meaning of the sentence see MERCHÁN, A., op. cit., pp. 190 and ff. The interchangeable name can be verified in the sources when they deal with the validity of contradictory rulings; the usual terminology refers to *juzgar un pleyto por alcaldes*, or by *alcaldes de avenencia*. *Fuero Real*, II, 13, 4.

they were not competent. There were two exceptions for this prohibition. The first one was if, once the lawsuit had started, the parties involved -or *compromitentes* according to the Indiano doctrine- committed themselves to resolve their differences outside the court. The second one, when there was an explicit royal licence to act in this way.¹³³

Another issue which was submitted to the legal provisions was the way in which the arbitral resolution for the achievement of a consent settlement had to be expressed. The consent settlement between individuals who requested a solution to previous matters found its expression in a *compromise*¹³⁴ which, following the aforementioned sources required the *signature* that represented act validation by those who acted as witnesses of the said agreement.¹³⁵

The consent settlement was not legally binding for third parties, as can actually be checked when the settlement in question had as its aim to exempt from the application of *lex talionis* (an eye for an eye) the aggressor of a victim whose heirs wished to enforce their rights after that victim's death -unless it was the granting of pardon. In any case, this modality for controversy resolution had the character of a commutative contract, which is why the obligation acquired by the parties was bound to the guarantee obligation. Also for the same reason, if one of the parties failed to comply with the obligation, the other one could exert the option.

The solution to the conflict was an opinion about the verified truth, which did not mean conviction or acquittal, since the conflict object always had to do with disputes over economic goods. The same treatment was given to the solution provided in the *Partidas*, which regarded the action of *dezir* by the arbitrators as the way to resolve conflicts peacefully¹³⁶. In the law of the *Partidas*, the compromise or consent settlement could appear either in a public document or in a private document or contract, with the corresponding signature of the parties.¹³⁷ This faculty was also present in Indiano law¹³⁸. In addition to these contractual elements, it was necessary to make

¹³³ D. Felipe II, in "Ordenanza 35 en Toledo a 25 de mayo de 1596 y en 28 de 1563", in *Recopilación de las Leyes de Indias*, Book II, t. 16, 81.

¹³⁴ MERCHÁN, A., op. cit., pp. 20-26.

¹³⁵ *ibid.*, p. 152.

¹³⁶ *Partidas* IV,10,8.

¹³⁷ The 'compromise letter' was the document which bore witness to the consent settlement reached between the parties. *Partidas*, III, 18, 106.

¹³⁸ HEVIA BOLAÑOS, *Curia Philipica*, op. cit., Book 2, chap. 14, No. 13, page 434.

explicit the exact date, the name of the parties, the arbitrators, the issue they dealt with, as well as the consequences and effects derived from the concord or agreement¹³⁹. Under no circumstances was a sentence actually pronounced; this last consideration would remain a constant over time and will have its corollary in Islamic Law as well.

The *ḥākim* declared a pre-existing custom violated by one of the parties, with no subjective appraisals or assessments¹⁴⁰. The arbitral decision was ultimately an opinion about *the verified truth*; but it did not entail conviction or acquittal, since the conflict object always had to do with disputes over economic goods. For this reason, it cannot be described as a sentence in the current technical sense of the term; it was actually a motivated opinion about the praxis or uses related to the issue under analysis which meant the unilateral violation of one right and was consequently free from subjective assessments¹⁴¹.

The contractual modality mentioned in the notarial form of Ibn al-‘Aṭṭār deserves some attention, since the fact that no specific form was demanded for *salaha* meant that there was no impediment for the parties to put it in writing. The agreement could be expressed in any possible form; no modality was compulsory, but the modality necessarily had to be chosen following the wishes of both parties. In fact, the presence of witnesses who could prove the consent settlement reached by the parties was usual.

¹³⁹ *Partidas*, III, 4.25 and 26.

¹⁴⁰ TYAN, E., *Histoire de l'Organisation*, op. cit., page 51.

¹⁴¹ TYAN, E., *Histoire de l'Organisation*, op. cit., page 51.